IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1122 of 1994

For Approval and Signature :

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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RAFIKBHAI S DODIYA & 9 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MB FAROOQUI for Appellant(s) : 1 - 8.- for Appellant(s) : 9,NOTICE UNSERVED for Appellant(s) : 10,
MS DS PANDIT, LD.APP for Respondent (s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 23/10/2007

ORAL JUDGMENT

1. The present appeal is preferred by the appellants-orig.accused-convicts of Atrocity Case No.61 of 1994 (hereinafter referred to as 'the appellants') decided by the learned Additional Sessions Judge, Sabarkantha at Himatnagar. As stated by Mr. M.B. Farooqui,

learned counsel appearing for the appellants, before commencement of the trial the appellant no.1-Rafikbhai Sharifbhai Dodiya, expired at the young age of 35 to 36 years and his name came to be deleted. So the trial ultimately proceeded against the present appellant nos.2 to 10. All of them have been held guilty vide judgment and order of conviction and sentence dated 21st November 1994 passed by the learned Additional Sessions Judge, Himatnagar, in Atrocity Case No.61 of 1994, for the charge of offences punishable under Sections 147, 149 and 323 of the Indian Penal Code and also under Section 3(1)(10) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act'). Each of the appellants is sentenced to undergo rigorous imprisonment for six months for the offence punishable under Section 323 of the Indian Penal Code and to pay a fine of Rs.100/-, and in default of payment of fine shall undergo rigorous imprisonment for two months. The appellant nos.2 to 10 have also been sentenced to undergo rigorous imprisonment for two months

and to pay a fine of Rs.50/- and in default to make payment of fine shall undergo rigorous imprisonment for seven days, for the offences punishable under Section 147 of the Indian Penal Code. So far as the offence punishable under Section 149 of the Indian Penal Code is concerned, the appellant nos.2 to 10 are sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.100/- and in default to make payment of fine, shall undergo rigorous imprisonment for two months. The appellants have also been sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.200/- and in default of payment of fine shall undergo rigorous imprisonment for two months for the offence punishable under Section 3(1)(10) of the Act. It is also ordered that the substantive sentence imposed shall run concurrently.

2. The appellants have challenged the legality and validity of the judgment and order of conviction and sentence under challenge in this appeal on various grounds mentioned in paragraph no.5 of the memo of the appeal. Mr.

M.B. Farooqui, learned counsel appearing for the appellants, has taken me through the case placed by the prosecution and also the evidence led during the course of trial and has made following main submissions :

(i) It is submitted that all the appellants may be acquitted as there is no cogent and sufficient legal and convincing evidence on record to link the appellants with the crime for which they have been held guilty.

(ii) The second fold of argument of Mr. Farooqui is that at least three names are emerging from record who allegedly had some scuffle with the complainant-Tulsibhai Sadabhai on the date of incident. One of them i.e. appellant no.1-Rafikbhai Sharifbhai Dodiya has already expired and, therefore, the Court may acquit all the appellants. The complainant has attempted to concoct a false story to implicate the maximum number of persons as accused. Some of them are members of one family; and so

the prosecution may be condemned for concocting a serious case against the appellants. The deposition of the witness who attempts to make exaggerations to implicate the accused persons may not be given any weightage, is the settled legal position. It is the duty of the Court to separate the grains from the chaff. But when such separation is not possible, the benefit may be given to the accused persons. So keeping this principle in mind, all the appellants may be acquitted.

(iii) The third fold of argument of Mr. M.B. Farooqui is that the complainant gave the complaint in question on a very trivial issue with a view to carve out a grave case against the accused persons. When the complainant says that the appellants had insulted and hackled him only because he is a member of the Scheduled Caste and the offence committed by the accused persons, thus, is punishable under the provisions of

the Act; then the evidence to prove those ingredients was required to be led. However, there is no convincing evidence to show that any offence punishable under the provisions of the Act can be said to have been made out and there are ample circumstances to show that in the said small village there was religious and communal harmony. Of course, certain precious suggestions have been denied by the complainant. But ultimately it has emerged that some hot exchange of words had taken place on the water-tap post installed for villagers by the Panchayat. Even as per the say of the prosecution, the complainant was called at 'Pan Galla' by the appellant no.1-Rafikbhai Sharifbhai Dodiya (deceased) and the complainant was asked by him as to why he (complainant being male) had come to fetch water on water-tap post where only females were there, especially of his (appellant no.1's) community. The evidence shows that the

appellant no.1 was a Momin gentleman and he had also suspected that one lady namely Nasim who had been to that water-tap post perhaps was teased, and therefore, the incident in question had taken place. There was no reason for the complainant to go to the water-tap post during night hours to fetch water when the females used to fetch water from the four taps installed in one line, and they were at a very close distance. It is the say of the prosecution that the complainant along with his wife Indiraben had gone to fetch water. If this story of the prosecution is believed, the act of fetching of water by Indiraben, even as per the say of the prosecution, was never objected and only the presence of complainant was a matter of objection.

(iv) This fact situation clinches the case of the prosecution placed against the accused persons so far as the offence punishable under the provisions of the

Act is concerned. The learned trial Judge ought to have acquitted the appellants from the charge of offence punishable under the provisions of the Act, saying that the complainant was being the only male present at the water-tap post installed by the Panchayat in the small interior conservative village; that too during night hours, where females were there to fetch water and so some incident might have happened but the prosecution has failed in giving the true account of the event.

(v) One of the other arguments advanced by Mr.Farooqui is that, keeping in mind the provisions of Section 141 of the Indian Penal Code, there is no evidence to prove the element of unlawful assembly. The prosecution is under obligation to establish firstly that there was an unlawful assembly when the offence came to be committed, only then the appellants could have been held guilty

for the offences punishable under Sections 147 and 149 of the Indian Penal Code. None of the appellants was aware or had even expected that after returning from the daily labour work, the complainant would come to water-tap post to fetch water for him and for his family members. It is in evidence that in the vicinity of water-tap post there was a 'Pan Galla' and the appellant no.1-Rafikbhai Sharifbhai Dodiya was sitting there along with some other persons. In response to the query raised by the Court, Mr. Farooqui has informed the Court that total population of village Mangadh, where the alleged incident has taken place, was not more than 1500 to 2000 in those days. For the sake of argument, even if the population is considered as of 5000, it would be difficult for this Court to believe that about 25 to 50 persons would be there near a 'Pan Galla' and out of those persons, 10 persons formed an unlawful assembly to assault the complainant as

pleaded by the prosecution. Therefore, the judgment and order of conviction and sentence recorded by the learned trial Judge for the offences punishable under Sections 147 and 149 of the Indian Penal Code is based on incorrect and illegal appreciation of evidence. Maximum two to three persons may have entered into hot exchange of words and that perhaps had resulted into some scuffle.

(vi) When it is emerging from evidence that the complainant was an experienced man as he was regularly visiting the Labour Court and was the General Secretary of the Labour Union and was appearing in the Labour Court on behalf of the labourers, it was not difficult for him to carve out a case against the maximum number of persons in respect of a very trivial issue. As per the complainant, the incident had occurred at 21-00 hours. The police station, as shown in the report under Section 157 of the Code of Criminal Procedure, 1973, received by

the Court, is at a distance of four kilometres. It is stated by the complainant himself that after the incident he had not even gone to his residence but he had just rushed to the Police Station for lodging the complaint. It is not in evidence whether he had hired any vehicle or he had gone on foot. In absence of any evidence, if the Court assumes that he must have gone on foot, then also he could have reached to the Police Station within a period of 45 minutes to one hour from the time of incident in question, being a young man of 30 to 35 years; the complaint can be said to be delayed complaint by 1½ hour. This time was used by the complainant in collecting names of maximum number of persons including the names of their respective fathers and even the surnames of some of the appellants.

(vii) PW-6-Indiraben, who is the wife of complainant, says that she does not know any of the appellants by name. She has

referred to one of the appellants in her deposition i.e.appellant no.1-Rafikbhai (deceased). Whether the wife of General Secretary of a Labour Union can be ignorant of the other male members of the village who had assaulted her husband; on the other hand, the husband was equipped with the names of all the 10 appellants with names and surnames of their respective fathers. The complainant has introduced use of knife in the incident by one of the appellants i.e. appellant no.4, and he has claimed that he was threatened by the said accused to life. The police during investigation has recovered one knife but the complainant has said that the muddamal knife was not the knife which was shown to him. Mr. Farooqui by pointing out material improvements and certain contradictions from the deposition of the complainant, has submitted that such a complainant ought not to have been believed as a reliable witness for linking the appellants with

the crime punishable under Section 323 of the Indian Penal Code.

(viii) All the injuries on the body of the complainant were minor and when the doctor has said that all these three injuries are possible by a single fall, the appellants ought to have been given at least benefit of doubt. In such a situation, the conviction recorded by the learned trial Judge may be quashed and set aside and all the appellants may be acquitted from all the charges levelled against them in respect of the offences in question.

1. According to Ms.D.S. Pandit, the learned trial Judge has placed reliance not only on the evidence of the complainant while appreciating the oral evidence, but the learned trial Judge has also considered the say of Indiraben-wife of the complainant, examined vide Ex.6, and Rama Sada-brother of the complainant, examined vide Ex.10. When the version of the complainant has been corroborated by his wife Indiraben, it would not be proper for this

Court to say that the complainant ought not to have been believed by the learned trial Judge. According to Ms.D.S. Pandit, learned Additional Public Prosecutor, in a small village collection of people is very speedy in such incidents. Though one witness has said that there were about 25 to 50 people, but the complainant has named the persons who had actually participated in the incident. Some exaggerations have been made by the prosecution witnesses namely the complainant, his wife Indiraben and his brother Rama Sada; but when some part of the deposition of even hostile witnesses show that some incident had occurred near water-tap post, there was no reason for the learned trial Judge to reject the evidence of the complainant. The complainant has stated as to by using what words, he was addressed and insulted by the accused. The complainant was addressed by his caste name, and was also asked as to why he has come to the water-tap post though he belonged to a particular caste i.e. Scheduled Caste. The injury found on the neck by the doctor who had examined the complainant also

corroborates the version of the complainant that he was caught hold by neck and his neck was also pressured, and therefore, according to Ms.D.S. Pandit, learned Additional Public Prosecutor, the conviction recorded by the learned trial Judge may be upheld.

3. The alternative submission of Ms.D.S. Pandit, learned Additional Public Prosecutor, is that if this Court is of the view that the offence punishable under the provisions of the Act is not made out and the Court can think of giving some benefit to the accused persons, then, according to her, this is not a case of clean acquittal.

4. Having considered the rival contentions vis-a-vis the evidence read over during the course of arguments advanced by Mr. M.B. Farooqui, learned counsel appearing for the appellants, and Ms.D.S. Pandit, learned Additional Public Prosecutor, I felt it necessary to state the substratum of the story of the prosecution which was placed before the learned trial Judge as well as in the FIR. For the sake of brevity and convenience, if some relevant part

of the FIR would be stated, it would be beneficial because the impeachment against the complainant is that he has crafted out a false complaint implicating maximum number of accused persons. His story before the Court is an improved version. There are certain contradictions between his oral evidence before the Court and the FIR given before the police; and if both these documents i.e. the deposition and the FIR are read simultaneously, it clearly gives an exaggerated version of the incident which might have occurred on the date of event. It is alleged by the complainant in the complaint that on 09th June 1994 at about 09-00 p.m., the complainant along with his wife had been to the water-tap post installed by the Panchayat to satisfy the requirement of the village people during summer days. At that place, males and females of the village used to fetch water, and on seeing the complainant, the appellant no.1-Rafikbhai Sharifbhai Dodiya (deceased) addressed the complainant by his caste name and asked him as to why he had gone to fetch water from the place where females of

the village used to fetch water. Is he not feeling ashamed ? The complainant in response to the same told that he and his wife had just returned from the daily work and as the water flow was on, they had gone to fetch water. At that time, taking the side of the appellant no.1-Rafik (deceased), his brother appellant no.2-Shahidbhai Sharifbhai Dodiya, etc. i.e. all the appellants, gathered. One of the appellants i.e. appellant no.4-Mehboob Yunusbhai Rajpura, was holding a knife. The appellant no.4 opened that knife and threatened the complainant. At that time, the appellant no.10-Zakirbhai Sharifbhai Patel, had attempted to throttle the complainant and the rest of the appellants had given fist and kick blows and all of them were addressing the complainant by his caste name and all were uttering, “Our females and children are fetching water and hence, why you people are coming to fetch water from our water-tap post” and, thus, the complainant was insulted. It is also alleged that the appellants were using very filthy language and the complainant was abused. It is alleged that he had started

shouting for help and at that time, his wife Indiraben and other residents of his area/ locality namely Hirabhai Mulabhai Vankar, Ramabhai Jivabhai Chenva and Mahendrakumar Keshabhai Vankar, etc. had reached there and the complainant was saved from further beating. It is the say of the complainant that all the appellants had threatened the complainant, if he would try again to fetch water from the said water-tap post, he might lose his life. According to him, he was wrongly and illegally prevented by the accused persons from fetching water from a public water-tap post installed by the Panchayat only because he was a member of the Scheduled Castes, and was assaulted and insulted on that count. On appreciation of the evidence, it is clear that three prosecution witnesses i.e. PW-3-Ramabhai Jivabhai Chenva, PW-4-Hirabhai Mulabhai and PW-7-Mahendrakumar Keshabhai Vankar, have not supported the case of the prosecution. PW-4 Hirabhai Mulabhai in his deposition has stated that he had been to 'Pan Galla' for getting a small packet of tobacco and when he was returning, the appellant no.1

and complainant-Tulsibhai had some conflict; and at that time, he had attempted to see that they are separated and do not enter into controversy. The complainant and the appellant thereafter had proceeded towards their respective residence. It is stated by this witness that on that day none of the other appellants was present and he has not heard anything which can be said to be insulting for Vankar community. Of course, one contradiction has been proved by the prosecution, but this contradiction simply suggests that the complainant was being abused by the appellant nos.1, 2 and other about 10 persons were uttering abuses and they were beating the complainant. Meaning thereby, this witness has also not stated the names of other accused persons before the Investigating Officer. In the deposition before the Court, he has stated that he had seen three accused persons when the incident had occurred, but had not seen any other accused person. He has deposed that he had seen the appellant no.1 and complainant, and they were quarreling. According to PW-10-Ramabhai Sadabhai, he was

not aware about the cause for which the quarrel had taken place. PW-10-Ramabhai Sadabhai is a partisan witness. On plain reading of evidence of PW-7-Mahendrakumar Keshabhai Vankar, it appears that it does not carry the case of the prosecution any further. So it is difficult to believe the say of Ms.D.S. Pandit, learned Additional Public Prosecutor that these three prosecution witnesses have supported the case of the prosecution. The evidence of all these three witnesses only establishes one fact that there was a quarrel between the appellant no.1 and the complainant near 'Pan Galla'. Now the crucial question is whether it should be accepted that this quarrel was on account of the insult done by the appellants for the act of complainant of fetching water from the water-tap post, or it was the result of something else than said by the complainant. It is not possible for this Court to accept that the complainant was prevented from fetching water from the public water-tap post because he belonged to a particular community i.e. Vankar Community. After five minutes of

the quarrel, Indiraben-wife of the complainant had rushed to her area/street to call their caste people so that they can come and help her husband, who was being beaten up by the appellants. During that period, two persons who were already there on the water-tap post to fetch water and who belonged to the community of the complainant, had not cared to save the complainant in the meanwhile. Meaning thereby, the other two members of the community of the complainant were already fetching water from the said water-tap post. This admission rules out the possibility and the allegation made by the complainant that he was stopped from fetching water merely because he belonged to a particular community. On the contrary, the evidence of the complainant gives an impression that he was perhaps the only male member on the water-tap post. The other females of the village were fetching water. It is not the case of either prosecution or complainant that Indiraben-wife of the complainant was prevented from fetching water or she was also simultaneously insulted or abused. When the complainant himself has

admitted in the cross-examination that there was a rush on the said water-tap post because of scarcity of water. Of course, he has denied that because of the rush there was any physical disturbance amongst the people who were fetching water. This indicates that number of females of village were there on the water-tap post and if the appellant no.1, who was at a reasonable distance at 'Pan Galla', had suspected that his sister-in-law (brother's wife) has not been treated properly by the complainant, he might have called the complainant as to why he has been there at the water-tap post when females are fetching water. It is the experience of the society that in larger part of our country, females fetch water either from the well or water-tap post. The presence of any male member on the water-tap post is viewed as doubtful, unless he stays alone or the female member in his family is sick or otherwise. On plain reading of the FIR gives an impression that presence of the wife of complainant at the water-tap post when the incident had occurred, is doubtful because in the later part of the FIR

at Ex.23, the complainant has stated that on listening the shouts of the complainant, his wife Indiraben and his brother Ramabhai Sadabhai as well as Ramabhai Jivabhai Chenva, Hirabhai Mulabhai and Mahendrakumar Keshabhai had come there. This indicates that only the complainant must have gone to the water-tap post to fetch water, and the words uttered by the appellant no.1 might have put the complainant to some anger. Any male who is asked by a subtle question as to why he is the only male member amongst the group of females when all of them are fetching water, that male member of the society may react as per his temperament. On the date of the complaint, the complainant was a young man of 30 years, comparatively more experienced, infirm and literate. So having such reputation in the village, the complainant might have felt bad. It appears that the same must have resulted into some quarrel. It is very likely that the appellant no.1 and one or two other appellants including the brother of the appellant no.1 might have entered into physical controversy with the complainant, but it would not be

either legal or proper for this Court to record any finding of any conjecture or surmises. While evaluating the finding recorded by the learned trial Judge, it is necessary for this Court to reappreciate the evidence of the complainant and other two witnesses who have been believed by the learned trial Judge. This Court has jurisdiction to reappreciate the entire set of evidence led by the prosecution and rewrite the judgment even while confirming or reversing the finding. According to me, the complainant ought not to have been believed as a reliable witness and for this, mainly the following good sound reasons have been ignored by the learned trial Judge :

(i) The version of the complainant is not believable as to the presence of his wife at the time when the incident started.

(ii) The description of name of all the appellants in detail by the complainant makes the complaint doubtful. It was possible for the learned trial Judge to

say that the maximum number of persons have been implicated by creating a story even on a small incident.

(iii) It is the say of the complainant that physical assault was made by all appellants. All of them were giving kick and fist blows, and one of them i.e. appellant no.4, had shown knife which was with him to the complainant, and this incident had continued for about 10 minutes. After five minutes of beating, the wife of the complainant had rushed to her residential area/locality to see that somebody rushes to rescue her husband. Even then no injuries, except three injuries as seen by the doctor, were found on the body of the complainant, though he was examined practically in couple of hours from the time of incident.

(iv) It is clear from the evidence of PW-1 Dr.Nitin Sadashiv Dongare, examined vide Ex.20, that the complainant had reached to the hospital with Police Yadi at

01-20 a.m. Meaning thereby, in couple of hours, and so it was possible for the doctor to notice the mark of violence on the body of the complainant. The doctor has also not stated in his deposition that when he examined the complainant, the complainant was in torn clothes.

(v) No clothes have been seized by the Police which can corroborate the version of the complainant.

(vi) The learned trial Judge has disbelieved the version of the complainant that the story told by the complainant before the Court about the use of knife by the appellant no.4-Maheboob and all the appellants have been acquitted from the charge of offences punishable under Section 506(2) and 504 of the Indian Penal Code, and a particular piece of evidence of complainant has not been found acceptable, then unless it is compelled to give reasons, the Court should go very slow in accepting the

rest of the part of the evidence of the very witness.

(vii) The Court is conscious that *falsus in uno, falsus in omnibus,* is not a good principle in our criminal jurisprudence. However, one falsity of a witness makes the Court more conscious and evidence of such witnesses need a very close scrutiny and the Court should try to seek maximum corroboration and the Court should not ignore the other modulations made by the witness in his deposition to suit with the substratum of the story placed by the prosecution and/or to win the sympathy of the Court. While evaluating the evidence of such witness, the Court should also consider minor contradictions and omissions. The ultimate effect of such modulations, contradictions, omissions vis-a-vis the falsity stated by the complainant in totality require consideration while accepting the say of such witnesses as reliable convincing piece of evidence.

But unless the Court is able to hear the ring of truth in some part of evidence, it would be risky to record conviction on the evidence of the witness who has capacity to craft out a story. It is rightly submitted by Mr. Farooqui that the complainant had enough time to modulate the entire story of incident in his own way and to implicate maximum number of persons though there was some scuffle and hot exchange of words near 'Pan Galla'.

(viii) There is no reference of the owner of the 'Pan Galla'. The complainant has also not named the said 'Pan Galla' in his deposition or complaint, otherwise he would have been the best independent witness available who could have supported the case of the complainant.

(ix) PW-10 Ramabhai Sadabhai-brother of the complainant has not been named in the FIR as witness to the incident. It is not even the say of the complainant in the FIR that his brother was one of the

persons who rushed at the spot to save him, even then he has been examined and the complainant has posed himself to be an eye-witness.

(x) Certain replies given by the complainant are found convenient replies to the question posed during the course of cross-examination, which is regarding acceptance of common membership in a cooperative society; acceptance of three to four teachers belonging to Scheduled Caste community in the said small village; about mass dinner arranged for all residents of village Mangadh, and also about the management of Mid-day Meal Scheme which was being managed by the members of the community of the complainant. It appears that the complainant has attempted to suppress many crucial aspects only to secure conviction under the Act and the Indian Penal Code and this has made the complainant unreliable witness.

(xi) When there is admission of the

complainant that he knows all the appellants by name and surname, then it was not possible for him to name all of them. It was possible for the complainant to select the persons who can be named as accused in 2½ hour time which was available to him. He had rushed to the Police Station with all preparations, only then he could have gone to the hospital with Police Yadi at odd hours i.e. 01-20 a.m., otherwise no patient would go for any treatment to the hospital who has sustained superfluous/ minor injury.

5. According to me, the complainant neither gets any corroboration from any independent witness nor from the medical evidence. His complaint though was registered by the Police within 2½ hours from the time of incident, is also found to be a result of craftsmanship. It was not safe for the Court to place reliance on the evidence of the complainant. On the contrary, the learned trial Judge ought to have observed that the complainant has attempted to

implicate maximum number of accused persons falsely and has disclosed a wrong cause for quarrel. Suppression of truth is emerging from the evidence of the complainant, simultaneously with the suggestion of false things.

6. As discussed earlier, the presence of PW-6-Indiraben Tulsibhai-wife of complainant-Tulsibhai, at the spot of the incident appears to be doubtful and, therefore, her evidence ought to have been considered as reliable piece of evidence by the learned trial Judge. Whether a wife would continue to see a mob beating her husband. Normally, she would rush to save her husband or would start shouting for help, keeping her presence at the spot only. The members of the community of the complainant were also there at the spot of incident. Non-inclination of these persons by intervening into dispute makes presence of PW-6-Indiraben at the spot of incident doubtful, otherwise she could have pursued the female members of her community to intervene and save her husband. There are contradictions between

the evidence of the said Indiraben and the complainant, which go to the credibility of evidence of Indiraben as well as the complainant. She has claimed that her husband was hackled and her husband was also taken away from the water-tap post. The complainant was throttled by the appellants and they were about 9 to 10 persons. However, she was not able to name any of the accused persons who were present in the Court. When she has admitted that it was night time and there was complete dark, she was not able to identify the accused persons. It is claimed that it was a big mob. At one place, she has admitted that she was fetching water when her husband had entered into quarrel with the mob of about 20 to 25 persons. She has also stated that after the incident she had stopped going to the said water-tap post. This clearly suggests that the members of Vankar community and family members of the accused persons used to fetch water from the said water-tap post and they had voluntarily stopped using the said water-tap post on account of the said quarrel in question. They had never stopped to fetch

water prior to the incident from the water-tap post where the alleged incident had taken place.

7. PW-10 Ramabhai Sadabhai, real brother of the complainant, does not disclose anything about the role played by PW-6-Indiraben-wife of the complainant. It is clear on plain reading of the evidence of this witness that he has been planted as witness. The evidence of this witness also suggests that the complainant is active and works for labourers; and he is the General Secretary of the Gujarat Kamdar Active Union. In the cross-examination, it has come on record that he has inquired about the incident subsequently from the complainant-Tulsibhai. Meaning thereby, he was not present at the time when the incident had taken place. The evidence of such witness ought not to have been considered as a good corroborative piece of evidence. For short, the finding recoded by the learned trial Judge as to the reliability of these three witness, requires to be reversed because the same is based on incorrect appreciation of evidence.

8. It is the say of the prosecution that on the date of incident, as the complainant had gone to fetch water on his return from daily work when there was complete dark and at the time when females of the village were fetching water, it was not possible to form an unlawful assembly by the accused persons. True it is that formation of an unlawful assembly may be spontaneous. But none of the accused were aware that the complainant is going to come for fetching water at the place where female members of the village also used to fetch water. The presence of some of the accused on 'Pan Galla' was natural and usual; and when it is in evidence that the complainant was firstly called by the appellant no.1 and there was one-to-one conversation between the appellant no.1 and the complainant, the learned trial Judge ought not to have presumed existence of any unlawful assembly. There is enough force in the say of Mr. Farooqui that merely because more than five persons had gathered near 'Pan Galla' and even if they had participated in the incident by one or the

other manner, would not form a group within the meaning of Section 141 of the Indian Penal Code as such there is no legal, cogent and convincing evidence to show that there was an unlawful assembly, either to insult, threat or beat the complainant. Mere presence would not make a person the member of an unlawful assembly. An act or omission would make a person a member of an unlawful assembly. Existence of common object is the basic thread and such type of evidence is required to be led by the prosecution to link the appellants with the charge of offences punishable under Sections 147, 148 or 149 of the Indian Penal Code. In absence of such cogent, convincing and legal evidence in this regard, the learned trial Judge ought not to have linked the appellants with the crime punishable under Section 147 and 149 of the Indian Penal Code. Merely because 10 persons have been named in the FIR, it would not be material; material is the common object and formation of an assembly for an illegal object. For short, the judgment and order of conviction and sentence on this ground for the offences punishable under

Sections 147 and 149 of the Indian Penal Code, is not found sustainable.

9. For short, for the reasons aforesaid, there is no cogent, convincing and legal evidence against any of the appellants individually for causing hurt i.e. simple injury, to the complainant. The complainant even has not blamed any independent appellants for three different injuries which were found on the outer part of his body i.e. near neck or on the neck. How the accused can cause injury on the neck of complainant by giving a kick blow unless the accused is able to raise his kick upto the neck of the complainant in the standing posture. This is not possible in standing position of the complainant. It is not possible for this Court to fix the liability of any one individual out of total 10 accused persons for causing injuries on the body of the complainant which were found very simple in nature. It is very likely that during initial discussion, the complainant might have sustained injury by the appellant no.1 only. In such a fact situation, the

judgment and order conviction and sentence under Section 323 of the Indian Penal Code, is also not found sustainable.

10. In view of aforesaid observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 21st November 1994 passed by the learned Additional Sessions Judge, Himatnagar, in Atrocity Case No.61 of 1994, is quashed and set aside. The appellants-orig.convicts are ordered to be acquitted from all the charges levelled against them in respect of the offences in question. The bail bonds stand discharged. The amount of fine, if any paid, be refunded to each of the appellants on proper identification.

(C.K. Buch, J)

Aakar